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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

RAYMOND RODRIGUEZ,

Defendant and Appellant.

D069898

(Super. Ct. No. BAF1300070)

APPEAL from a judgment of the Superior Court of Riverside County, Charles J. Koosed, Judge. Affirmed.

Marilee Marshall, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Peter Quon, Jr. and Marilyn L. George, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Raymond Rodriguez was charged with inflicting corporal injury resulting in a traumatic condition on Jane Doe, the mother of defendant's child (Pen. Code,¹ § 273.5, subd. (a); count 1); violating the personal liberty of Doe (i.e., false imprisonment; § 236; count 2); kidnapping Doe (§ 207, subd. (a); count 3); and threatening Doe, causing her to be in sustained fear for her own safety and/or the safety of members of her immediate family (§ 422; count 4). The jury found defendant guilty on counts 1 and 2; not guilty on count 4; and guilty of the lesser included offense of false imprisonment on count 3. The court sentenced defendant to three years' felony probation and ordered him to serve 180 days of local jail time.

Defendant's sole argument on appeal is that the court erred when it removed Juror No. 5 after it found this juror threatened another juror with bodily injury during deliberations. Affirmed.

BRIEF OVERVIEW

On December 6, 2012, Redlands Police Officer Esteban Valenzuela was dispatched to a hospital about 10:45 p.m. to interview victim Doe. At the hospital, Officer Valenzuela contacted Doe and Doe's mother. Officer Valenzuela interviewed Doe, which was recorded and played for the jury.

During the 30-plus minute interview, Doe stated she was at the hospital because she was 16-weeks pregnant and defendant, then her boyfriend and the father of her unborn child, had "beat [her] up"; that he had become angry earlier that day after learning

¹ All further statutory references are to the Penal Code.

they were having a baby girl; that he went "crazy" at night and started "hitting [her], pulling [her] hair, and . . . socking [her]"; and that he also bit her on the cheek and kicked her in the head. According to Doe, defendant several times stopped her from leaving his house and told Doe he was going to "kill" her and make her "life a living hell."

Doe told Officer Valenzuela she went inside the bathroom in defendant's house and text-messaged her mother asking for help. Doe's mother arrived at defendant's house just as defendant was attempting to take Doe to another location, after he realized she had used her cell phone while in the bathroom. When Doe's mother arrived, she asked Doe, "He [i.e., defendant] put his hands on you?" Doe's mother told Officer Valenzuela that Doe in response just started crying. Doe's mother demanded that Doe get in the car, and she then drove Doe to the hospital, where they were contacted by police.

At the hospital, Officer Valenzuela noticed Doe was "kind of bloody." Doe stated she began to bleed as defendant was "smacking [her] in the face." While at the hospital, another officer took photographs of Doe's injuries, including of the bite mark on Doe's cheek, the bruising on her arms and the blood on her pants. The photographs were shown to the jury.

At trial, Doe testified that she then wanted to be married to defendant and that she wanted him to be more involved with their daughter. With respect to the domestic violence incident on December 6, 2012, Doe testified when she told defendant they were having a girl, defendant was "happy, but still bummed because, of course, he wanted a boy." Doe also testified she was yelling at defendant on the night of the incident because of his reaction, or lack thereof, on learning they were having a baby girl. According to

Doe, at one point she threatened to jump out of the moving car being driven by defendant but changed her mind when defendant put his hand on her thigh.

On questioning, Doe denied defendant was angry on December 6. She also denied defendant struck her, pulled her hair or "la[id] a hand on [her] other than . . . [when] he put[] his hand on [her] thigh." Instead, Doe testified she struck defendant in the nose and he started "bleeding everywhere," which explained the blood on her pants. She then went into the bathroom in defendant's house, called her mother and they went to the hospital to check on her baby because she had been "upset." Doe admitted speaking to a police officer while at the hospital. However, she testified she "lied" to the officer about what defendant had done to her that day because she was angry at him.

Testifying in his defense, defendant stated Doe became upset because he was not as "ecstatic" as her when they learned Doe was having a baby girl. Defendant testified that when they went back to his house that night, Doe continued to yell at him while he remained quiet and tried to remain calm. At some point, Doe charged defendant and started "flailing" her arms at him. When defendant tried to stop Doe, according to defendant they became "entangled and [they] both fell to the ground." While on the ground, Doe punched defendant in the nose, causing it to bleed. Doe then went into the bathroom, where she stayed for about 15 minutes until she left with her mother.

DISCUSSION

A. Additional Background

After the People's presentation of the evidence, the record shows the court received a note from Juror No. 5. Outside the presence of the jury, the court noted Juror

No. 5 wrote: " 'In the event of a DV incident where evidence proves that DV took place' dot, dot, dot, 'is it relevant that the victim does not want prosecution in determining that a crime took place?' "

The court noted the "obvious answer" to this question was "no," but indicated it was not sure it needed to respond to the question. The prosecutor agreed with the court that no response was necessary and noted that it was "fair game" to address that issue in closing argument. The court agreed, after the defense submitted on the issue.

Deliberations commenced on September 16 and continued on September 17. On September 18, Juror No. 3, the foreperson, sent a note to the court which read as follows: "We require assistance as we are having personal issues between jurors that are interfering with our ability to deliberate. A threat has been made between jurors. We have spent more time arguing with each other than deliberating the case."

The court notified counsel of the note and explained it intended to question Juror No. 3 regarding the alleged threat. The record shows the prosecutor and defense counsel agreed with this strategy. Outside the presence of the rest of the jury, Juror No. 3 confirmed she wrote the note. When asked what she meant by "assistance" in the first sentence of the note, Juror No. 3 stated, "We need to know if we need to continue as we are or if we need to replace jurors. None of us have done this before. I don't know what we're doing."

With regard to the threat, on questioning by the court Juror No. 3 stated that it was Juror No. 5 who made the threat; that she did not hear the threat but that many other

jurors heard it and repeated it "verbatim"; and that Juror No. 5 said to Juror No. 2, " 'If you put your hands on me again, you'll be on your back or you'll end up on your back.' "

The court next asked Juror No. 3 if the threat by Juror No. 5 had anything to do with the case. In response, Juror No. 3 stated, "[T]he problem that we're having is we're not discussing anymore. We're having personal issues we're fighting over. We're not focused on the case. We have jurors that are getting into personal arguments." When the court again asked if the personal issues had anything to do with the case, Juror No. 3 stated, "They do to some point. I know that right now Juror No. 5 --"

Before Juror No. 3 could finish her sentence, the record shows the court interrupted and said, "I don't want to know how they are voting." The following colloquy then took place:

"[Juror No. 3]: No, no, but he [i.e., Juror No. 5] is feeling attacked, but in turn, he's also attacking others. And so in this we're having difficulty being fair, I guess. I mean, I think we're being more emotional than focusing on the legal aspects.

"THE COURT: When you say attacked, is that what relates to this threat about him, Juror No. 2, touching him?

"[Juror No. 3]: Can I tell you what happened?

"THE COURT: Sure.

"[Juror No. 3]: Yesterday we were having a discussion about the case. I don't remember what the discussion was about, but I believe that we were all -- we were all in agreement other than Juror No. 5. He was saying his point of view, and Juror No. 2 jumped up and said like you don't think that -- that -- what we're saying -- you don't agree

that's what this is? And everybody was like, you know, sit down. Relax. We went to lunch or to break. We came back, and Juror No. 2 came out of the elevator and he walked up to Juror No. 5 and put his hand on the back of -- back of his shoulder and said, 'Hey, can I talk to you for a few minutes?' They went over -- no one heard what they said, but Juror No. 2 said that he had apologized, and they said they had let it go, so I think that's what he [i.e., Juror No. 5] was referring to as far as if you put your hand on me again, you're going to end up on your back. The problem is that we keep going back to this.

"THE COURT: Okay. So now it's sounds [*sic*] to me, and you can correct me if I'm wrong, that that transaction between the two of them has now made it such that it's impossible to deliberate or very difficult?

"[Juror No. 3]: Very difficult.

"THE COURT: Because now they are not talking or discussing anything; would that be accurate?

"[Juror No. 3]: I do feel that since he feels like he's being attacked, I feel like he is shutting down and he's not -- he's not open to discussion.

"THE COURT: Okay. Anything else you want to add?

"[Juror No. 3]: Gosh, I don't know. There's a lot going on in there.

"THE COURT: All right. Like I said, I don't want to talk about your deliberations regarding the case --

"[Juror No. 3]: Right.

"THE COURT: -- but rather what the problem is surrounding the perceived threat. I think you've adequately done that. I just want to give you an opportunity if there's anything else to add. [¶] . . . [¶]

"[Juror No. 3]: Another thing I think is difficult is I think a lot of people rather than looking at the facts of the case and making a decision based on that, I think people are making decisions, emotional decisions, based on more of punishment, which I think might be an issue as well.

"THE COURT: Okay. Is that something that is being done by more than one juror? Has a juror actually said that or is that just your feeling about how people are assessing things?

"[Juror No. 3]: I do feel that -- that -- I might be wrong. I do feel that's how Juror No. 5 is approaching -- approaching the case. And he is -- he is very open, and I do believe that in some ways he -- he's valid in feeling like he's attacked because he'll say something and people will jump in to ask questions. And I understand that. I understand when you're feeling attacked, you're going to be on the defense. I just -- I don't know how effective we're being at being fair and unbiased at this point.

"THE COURT: Okay. All right. Thank you."

The record shows the court next questioned Juror No. 5, while Juror No. 3 remained in the courtroom. The court asked Juror No. 5 for his "side of the story about the perceived threat," which led to the following conversation:

"[Juror No. 5]: . . . It started early in our deliberations, sir. There are a few jurors who would have no way other than their way to convict.

"THE COURT: I don't want to know what way people are going.

"[Juror No. 5]: Okay.

"THE COURT: Whether guilty or not guilty is not my concern. He believed in whatever he believed.

"[Juror No. 5]: The thing is whenever I want to say something, it is disregarded. It is interrupted. Yesterday it got to the point where one of the jurors pounded on the table and got very, very upset because I was making an argument about, you know, what I thought the evidence had shown. This person pounded on the desk and got up, and, like, I really got intimidated by that and I felt threatened by that. So I told him, you know, don't do that. Don't do that, you know, I need to be able to express my thoughts and, you know, I'm not going to be persuaded just because you try to intimidate me. Okay. What? Do you want me to convict because you say so? I heard the evidence. We went back and forth.

"Ever since, we tried to establish a protocol where we all get to say our peace and understanding of the evidence. I felt like every time it was my turn to speak, I continued to get interrupted. That's -- I sort of feel like I'm put on the stand with questions back and forth. [¶] . . . [¶] I feel like I'm being put on trial myself. They keep -- a couple jurors ask me things and then the other way, and before you know it, they're saying you're contradicting yourself. I say no, I'm not. And so that has gone on for the better part of yesterday and today.

"THE COURT: I just want to keep -- stay focused.

"[Juror No. 5]: I'm going there. [¶] Yesterday after that incident when that juror stood up and kind of looked down at me and I -- I manifested that that's not acceptable. Don't try to intimidate me into seeing it your way. We went to lunch and came back. I was coming into where everybody was. That juror approached me and asked me if we can talk. I said of course. As we turned, he put his arm around me. And sir, I did not appreciate that because, you know, we had been going at it back and forth and I really do not appreciate how the jurors failed to look at all of the evidence. They just --

"THE COURT: Stay focused on what happened.

"[Juror No. 5]: So he grabbed me. He took me, you know, put his arm around me. He's a taller person. I just got like what are we doing here? [¶] . . . [¶] So when he put his hand around me, I did not appreciate it. I didn't know where he was going. Eventually we got to where he explained and I said fine. [¶] So today we come and we establish a few parameters. . . . We decided we were going to take turns. It got to my turn, and again, this juror interrupts me and starts asking me back and forth and I'm going wait a second. We did this all day yesterday. We established a way of doing things today, and you're still doing this. And so we went back and forth again to the point I told him please don't put your hand on me, don't put your hands on me again or I'll put you on the floor or something to that effect or I'll -- you know, you'll end up on the floor. I just basically warned him because I don't know if he's going to come back again to me later this afternoon and I don't know what he's going to do, but I just wanted to have a fair understanding that I'm not going to be touched again by him. I do not want it. I don't appreciate it. That's the extent of it, sir."

The record shows Juror No. 5 stated it was a "lynch mob in there" and his view there was "no reasoning." The record shows the court again interrupted Juror No. 5 and reiterated it was "not interested in knowing which way the jury is voting." The court next brought in Juror No. 2 and asked him about the threat.

Juror No. 2 explained: "Juror No. 5 was talking about something, I don't remember what it was, and he then -- I don't remember the segue, but just everything kind of blew up, but I was talking -- there was a lady next to me talking as well, and then (TJ10), I don't remember which juror number, she was talking as well. And then in the middle of that he told me that since I was 21, I had no clue about life and I'm out to hang somebody and that I want to get blood in this because I don't know what life is about. And I asked him -- I was like do you have a problem with me? He said if you ever -- he said F'ing or freaking touch me again, I will put you on your back. Then I said I never touched you. And he went on to say you grabbed my neck. And I said are you talking about yesterday when I apologized to you and I put my hand on your back?

"And I looked over at the -- first I looked at her and I said do you remember that? Then I looked over at the other juror outside yesterday. I was like do you remember that? They said, yeah. You put your arm around his back because yesterday he was upset that during deliberations when I stood up and he felt that I intimidated him. So I was like, hey, I'm really sorry if I intimidated you. I know you have a very strong personality. I have a strong personality as well. I never meant to try to intimidate you. If I stood up, it was out of passion. I was like I have a lot of respect for you, and he said thank you.

"And so I thought after that yesterday there would be no issues, but today he made it clear to me that he thinks I have blood out for somebody. And he also told another girl -- he said is the Court aware that your father is a defense investigator as if we have some sort of vendetta here.

"THE COURT: Okay.

"[Juror No. 2]: Then he said one of the other jurors said you know you just made a threat toward him, and he said no, it's just a warning.

"THE COURT: Do you feel as though I guess given the nature of the threat that that, or whatever it is he said to you, that you are able to still be a fair and impartial juror in the case?

"[Juror No. 2]: I've told him from the beginning. I was like, man, I was like I've completely just looked at this evidence based -- I was like there's nothing in this trial -- nothing I can get out of this trial at all. I was like this guy that's on trial, he's my age, you know --

"THE COURT: Let me stop you there. [¶] . . . [¶] Is there anything about him having threatened you, Juror No. 5 having said what he did say, which would keep you from being unable to deliberate with him, to continue to deliberate with him?

"[Juror No. 2]: No. He's the one that made it clear he doesn't want to deliberate with me, so --

"THE COURT: How did he do that?

"[Juror No. 2]: So yesterday he made a response. I asked why. He said, 'I'm not going to respond to you,' so the girl next me asked why. And then he said 'Well, I'll think about if I want to answer you.' "

The record shows the court instructed Juror No. 2 not to discuss the matter when Juror No. 2 returned to the jury room. The court next asked Juror No. 3, the foreperson, whether Juror No. 3 had anything to add and whether the statements of Juror Nos. 2 and 5 were reasonably accurate. In response, Juror No. 3 stated: "Yeah. I think so. I did watch as, you know, yesterday while he said he went to apologize, and both juror -- I think she was here. I think Juror No. 10, (TJ10), both her and I were like that's very big of him to go and apologize although I didn't hear what he said. I don't know what was said. I don't vouch for that, but it looked like very non-threatening to me. And like I said, I did not hear the threat today because I was busy doing something else, but this is a -- this is a jury-wide issue. A lot of people are having problems. [¶] I got a note from somebody. It was totally anonymous. It says we're having a problem that Juror No. 5 is not being impartial. He's being very biased."

The court confirmed that other jurors in addition to Juror No. 2 were having issues with Juror No. 5. In response to the court's question whether Juror No. 5 was able to engage in deliberations going forward, Juror No. 3 stated: "That a hard question. I think at this point it's -- yeah. I think it's more volatile at this point. I think since he feels attacked, he's not open to discussion and what we've discussed with him is when people ask him a question based on where he stands, we want to know why, what facts are you

seeing? We want to understand, and he's talking about being attacked. [¶] I can understand that viewpoint. I don't believe that anyone is being vicious in any way."

When asked whether Juror No. 5 was able to give reasons for his positions, Juror No. 3 stated: "I think today we were doing better. He does have some reasons for not doing it. It's not that he's being completely uncooperative. He does have his reasons. I do understand that."

When asked whether Juror Nos. 2 and 5 were able to deliberate any more, Juror No. 3 noted that Juror No. 5 was also questioning Juror No. 6, who said she felt "attacked" by Juror No. 5. When asked to explain, Juror No. 3 stated: "[W]e decided today what we were going to do is just go around the table and everybody would have their say and then we would discuss it. And so when it gets to him [i.e., Juror No. 5] to start making a comment, he sits back and he says something about body language is very important. And so we're like why are you saying that? Why is this relevant? He says, well, look at your body language. And he says you're just totally discounting what I'm saying. She [i.e., Juror No. 6] said I never did anything. He said you looked over at him and rolled your eyes. She was like I didn't do that. I looked over because he was writing. So, I mean, it's getting to a personal level. We can't -- we can't continue to discuss it in depth without being interrupted."

After all the jurors had left the courtroom, the record shows the prosecutor argued Juror No. 5 should be removed from the panel as a result of the threat and his refusal to deliberate with other jurors. Defense counsel disagreed, arguing that Juror No. 5 should remain on the panel and that Juror No. 5 was deliberating and "holding his own" in the

jury room. Defense counsel also argued that Juror No. 2 committed battery, a crime, by unlawfully touching Juror No. 5 and that the court should bring Juror No. 3 back into the courtroom to discuss the anonymous note she received.

The record shows Juror No. 3 was in fact brought back into the courtroom. Juror No. 3 said she did not know who wrote the handwritten note, which read: " 'We need to speak to the judge about (TJ05). He's not being reasonable nor following the law, not looking unfairly [*sic*] and attacking other jurors who disagree.' "

After excusing Juror No. 3, the court ruled as follows to remove Juror No. 5:

"Frankly, I've heard enough. I think the arguments made are, you know, both understandable by both sides. [¶] I think Juror No. 5 has committed juror misconduct by threatening another juror with bodily harm. [¶] I do not think Juror No. 2 has committed a battery on anybody, which requires some offensiveness. He was trying to console the other juror, if anything, by -- the foreperson indicated simply putting his hand on his back to say can we talk and wanted to apologize for his behavior. He didn't stand on a table. He stood up to the table. And, you know, juror deliberations get heated. They get heated. That's the nature of juror deliberations. [¶] The difference here is Juror No. 5 made, whether it's conditional or unconditional, made a threat to another juror to commit bodily harm to that person. Okay. That was inappropriate. That is inappropriate any way you want to slice it. Any kind of glasses you want to look through . . . it is inappropriate, 110 percent every day, all day. So I -- I don't have a whole lot of trouble finding that he's committed misconduct here. [¶] Moreover, it's clear to me that he's failing to deliberate. I asked him -- I told all of these jurors I don't want to know which

way you're flying. It doesn't make a difference to me. I'm not trying to steer this jury to one outcome or another. What I want are fair and full deliberations by all 12 jurors, and we're not getting that, and -- because I've got one juror who is threatening other jurors and who's simply at this point in my opinion not deliberating at all. And this is coming from more than one juror. [¶] This -- you can say, [defense counsel], that Juror No[s]. 2 and 5 have this vendetta against one another, but I've got the foreperson basically backing up Juror No. 2. Then I have another note also saying [Juror No.] 5 is acting that way. And then the foreperson backed that up and said that's true. That's how he's been acting. [¶] And so at this point, I'm sure over your objection, which is fine, you can make that objection, I'm going to replace Juror No. 5."

The record shows defense counsel next moved for a mistrial, arguing it was unfair to defendant to have the one person who has a difference of opinion dismissed from the jury. The court denied the motion for mistrial. In so doing, the court reiterated it was "not looking to steer this jury in any which way, shape, or form," but noted when it has "a juror threaten another juror, that's inappropriate in every which way you can possibly imagine." The record shows the court next denied defense counsel's request to dismiss Juror No. 2 as well.

After Juror No. 5 was replaced, the court instructed the jury that they needed to begin their deliberations from the beginning; that they were to set aside and disregard all past deliberations; and that they were not to consider the substitution of a juror "for any purpose." The following afternoon, the jury returned its verdicts.

B. Guiding Principles

It is well settled that a court may discharge a juror at any time, including during deliberations, based on a showing of "good cause" that the juror is "unable to perform his or her duty." (§ 1089.) " ' "Grounds for investigation or discharge of a juror may be established by his [or her] statements or conduct, including events which occur during jury deliberations and are reported by fellow panelists." ' " (*People v. Homick* (2012) 55 Cal.4th 816, 898 (*Homick*).)

"While removal of a juror is committed to the discretion of the trial court, upon review, the juror's disqualification must appear on the record as a demonstrable reality. 'The demonstrable reality test entails a more comprehensive and less deferential review' than substantial evidence review. 'It requires a showing that the court as trier of fact *did* rely on evidence that, in light of the entire record, supports its conclusion that bias [or other good cause for removal] was established. It is important to make clear that a reviewing court does not *reweigh* the evidence under either test. Under the demonstrable reality standard, however, the reviewing court must be confident that the trial court's conclusion is manifestly supported by evidence on which the court actually relied.' " (*Homick, supra*, 55 Cal.4th at p. 899.) In assessing the trial court's ruling, the reviewing court must "consider not just the evidence itself, but also the record of reasons the [trial] court provides." (*People v. Barnwell* (2007) 41 Cal.4th 1038, 1053 (*Barnwell*).)

"The trial court's authority to discharge a juror includes the authority to conduct an appropriate investigation concerning whether there is good cause to do so, and the authority to take 'less drastic steps [than discharge] where appropriate to deter any

misconduct or misunderstanding it has reason to suspect.' [Citation.] As we have stated, 'a trial court's inquiry into possible grounds for discharge of a deliberating juror should be as limited in scope as possible, to avoid intruding unnecessarily upon the sanctity of the jury's deliberations. The inquiry should focus upon the conduct of the jurors, rather than upon the content of the deliberations. Additionally, the inquiry should cease once the court is satisfied that the juror at issue is participating in deliberations and has not expressed an intention to disregard the court's instructions or otherwise committed misconduct, and that no other proper ground for discharge exists.' [Citation.]

Nonetheless, the need to protect sanctity of the deliberations does not mean that any inquiry into the deliberation process violates the defendant's constitutional or statutory rights: 'secrecy *may* give way to reasonable inquiry by the court when it receives an allegation that a deliberating juror has committed misconduct.' [Citations.] On appeal, we review for abuse of discretion the trial court's decisions concerning whether and how to investigate the possibility that a juror should be discharged for failure to perform his or her duties, and whether, ultimately, to discharge the juror or to take some other action." (*People v. Alexander* (2010) 49 Cal.4th 846, 926–927 (*Alexander*).)

C. Analysis

Here, the record shows the court thoroughly questioned Juror Nos. 2, 3 and 5 regarding the threat made by Juror No. 5 to Juror No. 2. The record further shows that after questioning each of these jurors, including Juror No. 3 twice, the court concluded Juror No. 5 did in fact threaten Juror No. 2 with bodily injury, which the court recognized was inappropriate. As such, the court further concluded there was good cause to

discharge Juror No. 5, particularly given that Juror No. 5 remained upset over what the court and other jurors perceived was a harmless incident from the day before when Juror No. 2 merely placed his hand on Juror No. 5's back/shoulder while apologizing to Juror No. 5.

Applying the demonstrable reality standard, as we must (see *Barnwell, supra*, 41 Cal.4th at p. 1053), we conclude the trial court's conclusion that good cause supported removal of Juror No. 5 because he threatened another juror with bodily harm is manifestly supported both by evidence on which the trial court actually relied and by the reasons for removal stated by the trial court (see *ibid.*). As such, we conclude the court properly exercised its discretion when it determined the threat was both real and serious and, as a result, removed Juror No. 5 from the panel. (See *Alexander, supra*, 49 Cal.4th at pp. 926-927; compare *People v. Keenan* (1988) 46 Cal.3d 478, 541 [noting an *alleged* threat by one juror, who denied making the threat, to kill an elderly holdout juror was not misconduct because the trial court found "insufficient evidence" the threat was made and because, even if there was a threat, "as the trial court suggested, no reasonable juror could have taken it literally"].)²

We also conclude the court properly exercised its discretion when it decided to question separately the three jurors, avoiding as best as possible intruding into the sanctity of the jury's deliberations while at the same time addressing the very real and

² In light of our decision, we deem it unnecessary to determine whether there was also good cause to remove Juror No. 5 from the panel based on his alleged failure to deliberate.

significant issue of the threat of bodily harm made by Juror No. 5. (See *Alexander*, *supra*, 49 Cal.4th at pp. 926-927.)

Indeed, the record shows that several times during its questioning of Juror Nos. 2, 3 and 5, the court stopped each juror midsentence and stated that it did not want to know any details of the jury's deliberations and that its only concern was making sure all jurors were fully deliberating. We thus conclude the court properly balanced the need to obtain information about the threat of bodily injury made by Juror No. 5 against the need to protect the sanctity of the jury deliberations. (See *Alexander*, *supra*, 49 Cal.4th at pp. 926-927.)

We further conclude the trial court properly exercised its discretion when it denied defendant's mistrial motion. (See *People v. Jenkins* (2000) 22 Cal.4th 900, 985-986 [noting a "motion for mistrial is directed to the sound discretion of the trial court"].) "A mistrial should be granted if the court is apprised of prejudice that it judges incurable by admonition or instruction. [Citation.] Whether a particular incident is incurably prejudicial is by its nature a speculative matter, and the trial court is vested with considerable discretion in ruling on mistrial motions." (*People v. Haskett* (1982) 30 Cal.3d 841, 854 (*Haskett*).)

Here, the evidence in the record supports the (implied) finding of the court that discharging Juror No. 5 from the panel did not rise to the level of incurable prejudice. (See *Haskett*, *supra*, 30 Cal.3d at p. 854.) Indeed, the record shows after Juror No. 5 was removed, the court admonished the jury that it was to start its deliberations anew; that it was not to consider any past deliberations; and that it was not to consider the substitution

of a juror "for any purpose." The record further shows the jury deliberated later that same day and until 2:00 p.m. the following day, when it reached its verdicts. As noted *ante*, the jury found defendant guilty on counts 1 and 2, acquitted him of making a criminal threat on count 4, and found him guilty of the lesser included offense of false imprisonment on count 3. The jury verdicts thus support the inference the jury was able to deliberate fully, including with Juror No. 2 on the panel, once Juror No. 5 was removed from the jury. As such, we find no abuse of discretion in denying defendant's motion for mistrial or his request that Juror No. 2 also be removed from the panel.

DISPOSITION

The judgment of conviction is affirmed.

BENKE, Acting P. J.

WE CONCUR:

McDONALD, J.

AARON, J.